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# HARVARD LAW REVIEW.

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Published monthly, during the Academic Year, by Harvard Law Students.

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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FEDERAL JURISDICTION OF SUIT AGAINST "STATE DISPENSARY COMMISSION." — The many cases which have decided whether a suit brought nominally against state officials is really against the state and hence not cognizable by the federal<sup>1</sup> or other<sup>2</sup> courts, reduce to no satisfactory general principles,<sup>3</sup> but at least afford arguments by analogy to a new set of facts, such as that recently presented in South Carolina. The legislature, having abolished the state monopoly of the sale of liquor, authorized the appointment of a commission whose duty it should be to close out the business of the state dispensary, to sell the personalty, determine and discharge the liabilities, and pay the surplus to the state treasurer. A creditor of the dispensary filed a bill in the federal court against the commission, asking for a receivership, injunction, and accounting as to the funds in its hands. The Circuit Court of Appeals, contrary to the decision of the state appellate tribunal,<sup>4</sup> sustained the jurisdiction of the Circuit Court, on the ground that the state, having assigned for the benefit of creditors, was not a necessary party defendant, or so substantially interested as to clothe the assignee with immunity from suit. *Murray v. Wilson Distilling Co.*, 164 Fed. 1 (C. C. A., Fourth Circ.). It is believed that the creation of the commission was not in effect such an assignment,<sup>5</sup> but rather the appointment of agents who would not take title; that, granted the state did assign, it nevertheless should have been joined as an assignor entitled to the surplus of the proceeds,<sup>6</sup> and therefore jurisdiction failed for defect of parties;<sup>7</sup> and that finally, granted

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<sup>1</sup> U. S. Const., Amend. XI.

<sup>2</sup> *Owen v. State*, 7 Neb. 108.

<sup>3</sup> See 20 HARV. L. REV. 245; 21 *Ibid.* 527.

<sup>4</sup> *State v. Murray*, 60 S. E. 928 (S. C.).

<sup>5</sup> *Cf. McHose v. Dutton*, 55 Ia. 728.

<sup>6</sup> *Houghton v. Davis*, 23 Me. 28. *Contra*, *Wells v. Knox*, 55 Hun (N. Y.) 245. See Story, *Equitable Pleadings*, § 153.

<sup>7</sup> *Cunningham v. Macon*, etc., R. Co., 109 U. S. 446.

even that the state was not a necessary party, the court was not justified by the precedents in considering the suit not to be against the state. For it seems to fall on the same side of the line as the cases which hold that a court has no jurisdiction to issue a mandate which virtually enforces the contract of the state,<sup>8</sup> or compels affirmative action on the part of officials not charged with a clear ministerial duty,<sup>9</sup> or affects the property of the state in the hands of its agents,<sup>10</sup> or compels payment from the state's funds,<sup>11</sup> or imposes a trust on the state's property.<sup>12</sup> On the other hand, this suit seems distinguishable from one against a corporation of which the state is a member,<sup>13</sup> since here the state has direct ownership of at least the surplus; or from a proceeding to determine the state's interest in a *res* not in its possession;<sup>14</sup> or from an action of ejectment against state officers when the state shows no *prima facie* title.<sup>15</sup> The two chief authorities for the court's position are early cases<sup>16</sup> in the circuit courts, scarcely mentioned in later discussions. Moreover, if an agency, not an assignment, should be found here, the result appears still less tenable.

The court hints at another ground for the decision, namely, that liquor selling is not a governmental function,<sup>17</sup> and hence not intended by the adopters of the Eleventh Amendment to be protected from judicial interference. It is true that dicta have occurred to the effect that a state loses its sovereignty when it steps down into the marketplace.<sup>18</sup> But no case will be found depriving a state of immunity from suit on this ground alone. Doubtless the constitutional prohibition cannot thus be narrowed in application; for it is based on an actual lack of power rather than a theory of government.<sup>19</sup>

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FORMATION OF A CORPORATION FOR THE PURPOSE OF EFFECTING DIVERSITY OF CITIZENSHIP. — Questions of federal jurisdiction over corporations under the diversity of citizenship clause first arose at a time when the federal judiciary was as anxious to extend its jurisdiction as it is now to restrict it. Although corporations are not citizens within the meaning of the Constitution, this did not prove fatal to federal jurisdiction, since the courts early declared that the stockholders were the real parties in interest and their citizenship the determining factor.<sup>1</sup> The further difficulty, that

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<sup>8</sup> *Louisiana v. Jumel*, 107 U. S. 711.

<sup>9</sup> *Farmer's Nat'l Bank v. Jones*, 105 Fed. 459.

<sup>10</sup> *Christian v. Atlantic, etc., R. Co.*, 133 U. S. 233. *Contra*, *Sinking Fund Com'r's v. No. Bank, etc.*, 1 Metc. (Ky.) 174.

<sup>11</sup> *Brown University v. Rhode Island College, etc.*, 56 Fed. 55.

<sup>12</sup> *Lowry v. Com'r's Sinking Fund*, 25 S. C. 416; *Bd. Public Works v. Gannt*, 76 Va. 455. *Contra*, *Preston v. Walsh*, 10 Fed. 315; *Chaffraix v. Bd. Liquidation*, 11 Fed. 638.

<sup>13</sup> *Southern R. Co. v. North Carolina R. Co.*, 81 Fed. 595.

<sup>14</sup> *U. S. v. Peters*, 5 Cranch (U. S.) 115; *Swasey v. North Carolina R. Co.*, Fed. Cas. No. 13679.

<sup>15</sup> *Tindal v. Wesley*, 167 U. S. 204.

<sup>16</sup> *Chaffraix v. Bd. Liquidation*, *supra*; *Preston v. Walsh*, *supra*.

<sup>17</sup> *Cf. South Carolina v. United States*, 199 U. S. 437. But see *Vance v. Vandercook*, 170 U. S. 438; *State v. Aiken*, 42 S. C. 222.

<sup>18</sup> See *Charleston v. Murray*, 96 U. S. 432; *Bank of United States v. Planter's Bank of Georgia*, 9 Wheat. (U. S.) 904; *The Floyd Acceptances*, 7 Wall. (U. S.) 666.

<sup>19</sup> See *Kawananakoa v. Polyblank*, 205 U. S. 349.

<sup>1</sup> *Bank of U. S. v. Deveaux*, 5 Cranch (U. S.) 61. When the corporate fiction was thus disregarded in an action at law it was in open violation of the principle that that